Petition

81-943

No.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

PRIME MOVERS, INC.;
KATHERINE F. IRVIN; and
DONALD R. SULLIVAN - - - - - Petitioners

versus

KENTUCKY BOARD OF ELECTIONS;
THE HONORABLE FRANCES JONES MILLS, Secretary of State and Chairperson of the Kentucky Board of Elections;
BRADY A. MIRACLE, Executive Director, Kentucky Board of Elections;
JEFFERSON COUNTY BOARD OF ELECTIONS;
BREMER EHRLER, Jefferson County Clerk and Chairperson, Jefferson County Board of Elections;
SHELBY COUNTY BOARD OF ELECTIONS; and
SUE PERRY, Shelby County Clerk and Chairperson, Shelby County Board of Elections - Respondents

PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS OF THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

Whether KRS 117.075(1) and KRS 117.085 impair the right to vote in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution by establishing a voter classification system which imposes additional requirements to vote by absentee ballot on persons solely because they are physically disabled?

Whether KRS 117.075(1) violates the Twenty-Fourth Amendment to the United States Constitution by requiring a physician's verification statement of disability which imposes a financial cost on the voter?

Whether the District Court erred in dismissing, on the pleadings, Petitioners' claims that the Kentucky absentee ballot process, which classifies absentee voters as "special" and "regular", impermissibly discriminates against physically disabled voters.

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SHELBY COUNTY BOARD OF ELECTIONS;
SUE PERRY, Shelby County Clerk and Chairperson, Shelby County Board of Elections - - - - - *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS OF THE SIXTH CIRCUIT

Prime Movers, Inc., Katherine F. Irvin, and Donald R. Sullivan, Plaintiffs-Appellants in the court below, respectfully petition for a writ of certiorari to review the final judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (App. A, *infra*, 33-34), was entered on July 17, 1981, and was not officially reported. The order (App. B, *infra*, 35) denying Plaintiffs-Appellant's petition for rehearing *en banc* was entered September 18, 1981. The opinion of the United States District Court for the Western District of Kentucky and its order was entered on February 6, 1981 (App. C, *infra*, 36-42).

JURISDICTION

The judgment of the Court of Appeals (App. A, *infra*, 33-34) was entered on July 17, 1981. Plaintiffs-Appellants' petition for rehearing *en banc* was denied on September 18, 1981 (App. B, *infra*, 35). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fourteenth Amendment, Section One:

> "* * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

United States Constitution, Twenty-Fourth Amendment, Section One:

> "The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax."

STATUTORY PROVISIONS INVOLVED

Kentucky Revised Statutes 117.075(1), Special Ballot for Disabled Voters:

> "(1) Any qualified voter who has not been declared mentally disabled by a court of competent jurisdiction, and who, on account of age, infirmity or illness, is not able to appear at the polls on election day may vote in the following manner. At least seven (7) days prior to the date of the election, he shall present to the clerk by mail his verified statement that his inability to appear is due to age, infirmity, or illness, and a verified statement of a physician corroborating the voter's statement and indicating whether or not the condition is temporary, applying to the instant election only, or is expected to be a continuing one. If the condition is indicated as being continuing the voter need not file further statements of disability. For ensuing elections the voter may make reference to the statement previously filed when applying for a special ballot. The county clerk shall maintain a file of all such statements. Upon receipt of the verified statement, the clerk shall

immediately mail to the voter a special ballot, and envelopes, and the voter shall cast his vote in the same manner as provided for the absent voter in KRS 117.087."

Kentucky Revised Statutes 117.085, Absent Voters' Ballots:

"(1) Any qualified voter in any county who will be absent from the county on any election day or any person incarcerated in jail that has been charged for a crime but has yet to be convicted of the said crime, at any time not less than (7) days before the election, make application in person or by mail to the county clerk for a special ballot, except that such ballot shall be restricted to the use of the voter, the voter's spouse, the voter's parents, or the voter's children. The clerk shall type the name of the absent voter on the application form for that person's use and no other. The application form shall be in the form prescribed by the state board of elections, shall bear the seal of the county clerk and shall contain the following information: name, residential address, precinct, party affiliation, statement of absence on election day, statement of compliance with residency requirements for voting in said precinct, and the voter's mailing address for a special ballot. The form shall be verified and signed by the voter. A notice of the penalty provided in KRS 117.995 (4) shall be printed on the application."

Kentucky Revised Statutes 117.065. Establishing Voting Places for Precincts; Change; Expense.

"(1) The county board of elections shall, not later then September 20 of each year, establish the voting place for each precinct. If a change becomes necessary after that date, notice of change shall be published pursuant to KRS Chapter 424. If a change becomes necessary on election day, notice shall be posted at the former voting place. The expense of renting voting places, for which rent of not less than twenty ($20.00) shall be paid, shall be paid in the same manner as other election expenses.

Kentucky Revised Statutes 117.995(4), Penalties:

"(4) Any person who signs a name other than his own or an application for an absentee ballot or on the verification form for an absentee ballot, or any person who votes an absentee ballot other than the one issued in his name, or any person who applies for an absentee ballot for the use of anyone other than himself or his spouse, or any person who makes a false statement on an application for an absentee ballot shall be fined not less than one hundred dollars ($100) nor more than one thousand dollars ($1,000) or imprisoned in the county jail for not more than one (1) year, or both."

STATEMENT OF CASE

On October 23, 1980, Prime Movers, Inc., an advocacy group for disabled persons, and two individual physically disabled persons initiated this litigation on behalf of themselves and a class of all persons who have been, are presently or will be physically disabled and registered to vote in the Commonwealth of Kentucky.

Petitioners sought to have Kentucky Revised Statute 117.075(1) declared unconstitutional and enjoined from enforcement. This statute places additional requirements and burdens on physically disabled persons who cast their vote by utilizing the absentee process. In order for a disabled voter to use a "special" absentee ballot, KRS 117.075(1) requires the disabled person to: (1.) present a sworn statement that his inability to appear at their assigned polling place is due to age, infirmity, or illness, and (2.) at his own expense, obtain a verification statement by a physician corroborating the voter's statement of disability which must be submitted with his application. The disabled voter is required to present his application by mail only. A non-disabled voter who requests a "regular" absentee ballot, because he will be absent from the county on election day, may submit his own sworn statement as to his need to vote by absentee ballot. He is not required to present any independent verification of his need to vote by absentee ballot. He also may elect to present this application in person or by mail. KRS 117.085.

Petitioners' claims are based on the Equal Protection Clause of the Fourteenth Amendment, the Fifteenth Amendment and the Twenty-Fourth Amendment to the United States Constitution.[1]

The District Court entered a Temporary Restraining Order prohibiting the enforcement of KRS 117.075(1) in that it required a doctor's verification statement and permitted return of the application only by mail. Also, an Order was entered extending the time

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[1]The Petitioners' Amended Complaint alleged that the Kentucky statutory scheme, which establishes two classes of absentee ballots, "regular" and "special", with significantly different procedures and requirements to qualify to receive the ballot, violates the Voting Rights Act (42 U.S.C. §1971(a)(1) and §1971(a)(2)(A)). That federal statute reads, in relevant part:

> No person acting under color of law shall
> A. [I]n determining whether any individual is qualified under State law or laws to vote in any election, apply any standard, practice, or procedure different from the standards, practices or procedures applied under such law or laws to other individuals within the same county, parish, or similar political subdivision who have been found by State officials to be qualified to vote. 42 U.S.C. §1971(a)(2)(A).

The Respondents also burden the right of disabled persons to vote by selecting polling places which are architecturally inaccessible because of steps, narrow doorways and steep slopes. Petitioners' Amended Complaint alleged that selection of polling places which limit or deny only to those voters who are physically disabled violates the Equal Protection Clause of the Fourteenth Amendment, and the Twenty-Fourth Amendment as well as the provisions of the federal Voting Rights Act (42 U.S.C. §1971(a)(1) and 42 U.S.C. §1971(a)(2)(A)). The Amended Complaint also alleged a state law violation by the selection of inaccessible polling places under the Kentucky Architectural Barriers Act (KRS 198B.210, formerly KRS 227.305) and implementing regulations (815 KAR 40:010). The District Court had jurisdiction over the state law claim under the doctrine of pendent jurisdiction.

for which the Temporary Restraining Order would be enforced until after the election.

Pursuant to a Pretrial Order, Respondents submitted a memorandum solely on the question of the arbitrary classification of the "regular" absentee ballot and the "special" absentee ballot. At the same time, Petitioners submitted a memorandum solely on whether the failure of Respondents to provide accessible polling places presented a federal question. No Anwers were filed by any of the Respondents in this matter. The only responsive pleading filed by Respondents was a Motion to Dismiss filed simultaneously with Respondents' memorandum. The District Court entered its final and appealable Order dismissing the Complaint on February 6, 1981. (See App. C, *infra*, 36-42.)

A timely appeal was made by Petitioners to the United States Court of Appeals for the Sixth Circuit. The District Court's Order was affirmed on July 17, 1981 (App. A, *infra*, 33-34). Judge Jones dissented, and would have remanded the matter to District Court for an examination of the discriminatory disparate impact on disabled voters of the absentee ballot procedures. The Petition for Rehearing *en banc* was denied on September 18, 1981 (App. B, *infra*, 35) by the court.

Because the Complaint was dismissed on the pleadings and without an Answer, the facts alleged in the Complaint are unrebutted and should be accepted as true.

Petitioner Katherine F. Irvin is a quadriplegic who uses an electric wheelchair. She is registered to vote in Jefferson County, Kentucky. In order to vote by the special absentee ballot, Irvin must complete part of the application, and either send it to her physician or visit her physician to have the form completed and her disability verified. The application must be returned by Irvin to the office of Respondent Clerk Erhler by mail and not in person. If Irvin fails to meet the requirements of KRS 117.075(1) which are necessary to utilize the "special" absentee ballot, she will be unable to vote except by appearing in person at her assigned polling place. (App. D, *infra*, 43).

Petitioner Donald R. Sullivan was unable to leave his residence in Shelbyville, Kentucky, as a result of an automobile accident. Prior to election day, November 4, 1980, he did not know whether he would be able to appear at his polling place on that day. Due to his disability, he believed that he would only be able to visit his polling place by using a wheelchair, if at all. Sullivan was registered to vote in Shelby County, Kentucky. He had never applied for, nor had he voted by, the "special" absentee ballot. In order to vote by the "special" ballot, Sullivan would have had to acquire the application form, complete his verified statement, contact a physician for verification of his disability, perhaps pay the physician for completing the form, and return it in a timely fashion. If those efforts had failed, he would have been unable to vote except by appearing in person at his assigned polling place. Sullivan's assigned polling place, West Middle

School, Shelbyville, Kentucky, is inaccessible to persons in wheelchairs because entry requires negotiation of several steps. (App. E, *infra,* 45-46).

The burdens placed on the named Petitioners by the requirements of the "special" absentee ballot are similar to those imposed on the class of disabled voters Petitioners sought to represent. The impact of the provisions on disabled voters generally is reflected in the record. Petitioner Prime Movers, Inc. conducted a survey of "special" ballot users in the 1977 and 1978 general elections and the results were summarized in the affidavit of Eileen Ordover (App. F, *infra,* 47-51) and incorporated in the Complaint:

> Examination of records of the Jefferson County Clerk revealed that 14.6% of the registered voters who applied for the special absentee ballot in 1977 and 1978 did not get ballots, due to procedural problems. In the 1977 General Election, 243 individuals applied for the special absentee ballot; 236 were sent ballots and 215 cast actually recorded votes. Twenty-eight people for one reason or another did not complete the process by actually casting a recorded vote. In 1978 sixty-five ballots were sent to disabled applicants, forty-nine were returned and counted, and sixteen did not complete the process, for some reason. The reasons for failing to complete the process were understood to include missing the statutory deadline for applying, loss of application through the mail, failure to obtain a physician's statement, or failure to return the ballot.
>
> * * *
>
> Forty percent of the survey respondents stated that they, or a friend or family member, had to

> visit the doctor in order to get the physician's statement. Eleven percent said that they had to have a physical examination. Ten percent reported having to pay a fee to be examined in order to get the physician's statement for the special absentee ballot application.
>
> * * *
>
> Fifty-five survey respondents voted by absentee ballot in 1977 or 1978, but not both years; 13.6% of those who voted in only one of those years stated that they did not vote in the other year on account of the trouble involved in obtaining the special absentee ballot.

One of the major conclusions of the "Disabled Voter Participation" report based on the survey is that physically disabled voters are deterred from voting by the "special" absentee ballot process:

> The procedural obstacles confronting the disabled voter raise the cost of his or her vote beyond the cost of the able-bodied voter's ballot. Forced by law to expend more in planning and energy in order to purchase the same right and deprived of access to the last-minute information available to others, disabled people participate in the electoral process on a basis unequal with their able-bodied peers.

Many physically disabled individuals who would prefer to vote on election day at their polling place are denied this opportunity because Respondents have

selected polling places which have architectural barriers preventing their entry.[2]

The procedural barriers of the absentee ballot, coupled with the difficulties created by Respondents' method of selecting polling places, actually and predictably result in the denial of the right to vote, and impermissibly burden those voters who complete the process.

As a practical matter, disabled voters are required to pay a doctor for an examination and/or completion of the "special" ballot application solely in order to vote. This state-imposed cost is only required from disabled persons who seek to use the absentee ballot and not from voters who are not disabled.

Petitioners Irvin and Sullivan and other physically disabled voters have had and will continue to have their right to vote impaired and denied solely on the basis of their disability and are required to follow a process not required of non-disabled voters.

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[2]County boards of elections, including Respondents Jefferson County Board of Elections and Shelby County Board of Elections, enter into leasing agreements with other public and private entities for the use of polling places on election day. Respondents follow no uniform procedure to advise voters of architectural barriers at polling places and the final decision on location of polling places may not be made until shortly before the election App. G, *infra*, 52-55), or on the day of the election. KRS 117.065(1). Those disabled voters not aware of architectural barriers at their regular polling places or whose polling places have been moved to an inaccessible location less than seven days before the election will effectively be disenfranchised because it will be too late to apply for the "special" ballot. In many cases, disabled voters are forced to vote by the "special" absentee ballot because they cannot enter their polling place.

REASONS FOR GRANTING THE WRIT

I. The District Court and Court of Appeals Have Decided Federal Questions of Substance Which Have Not Been, But Should Be, Settled by This Court.

A. Under Applicable Decisions of This Court, the Absentee Ballot Voter Classification System Established by Kentucky Election Statutes On Its Face Impermissibly Impairs And/Or Denies the Fundamental Right to Vote of Disabled Citizens in Violation of the Fourteenth Amendment.

KRS 117.075 and KRS 117.085 classify absentee ballot voters as "regular" and "special" and require different conditions for voting based on this classification system. This Court has not yet addressed the issue presented in this case: Whether a state can require different conditions for voting by absentee ballot by classifying voters as "special" or "regular"?

1. An Exacting Examination of KRS 117.075 is Required as it Affects the Fundamental Right to Vote.

This Court has consistently imposed an exacting examination when reviewing the constitutionality of state statutes which place additional conditions and impose classifications on the fundamental right to vote. Any alleged infringement of voting rights is to be "meticulously scrutinized" as a citizen's ability to vote is preservative of other basic civil and political rights. *Reynolds* v. *Sims,* 377 U. S. 533, 562, 84 S. Ct. 1362, 1381 (1964); *Williams* v. *Rhodes,* 393 U. S. 23, 31, 89 S. Ct. 5, 10 (1968), and *Wesberry* v. *Sanders,* 376 U. S. 1, 17, 84 S. Ct. 526, 535 (1964). In scrutinizing

whether a state statute violates the Equal Protection Clause, this Court has applied a standard of review which carefully considers the facts and circumstances behind the statute, the interests which the state claims to be protecting and the interests of those persons disadvantaged by the statute. *Williams* v. *Rhodes, supra,* at 30 and *Kramer* v. *Union Free School District,* 395 U. S. 621, 626, 89 S. Ct. 1886, 1889 (1969). Applying this standard in *Kramer, supra,* at 627 and 628, this Court stated:

> Therefore, if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest. See *Carrington* v. *Rash, supra,* 380 U. S. at 96, 85 S. Ct. at 780.

Where the right to vote has been restricted by state action, the " 'purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny.' " *Evans* v. *Corman, supra,* 398 U. S. at 422, 90 S. Ct. at 1755. *Dunn* v. *Blumstein,* 405 U. S. 336, 92 S. Ct. 995, 1000 (1972) where a constitutional right to vote is burdened, an exacting analysis is required. *Id.*

The absentee ballot process established by state statutes has been recognized by this Court to impact directly on a citizen's fundamental right to vote. In *American Party of Texas* v. *White,* 415 U. S. 767, 94 S. Ct. 1296 (1974), this Court found that the Texas

absentee ballot provisions must be reviewed by the strict standard articulated in the aforementioned cases and that the rational basis standard was erroneous.

This Court has stated that "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *See Wesberry* v. *Sanders, supra,* 376 U. S. at 17. Kentucky's absentee ballot provisions act to deny its disabled citizens a voice in elections of public officials.

Disabled absentee voters are separated from all other categories of absentee voters and required to meet additional conditions in order to exercise the right to vote through the absentee ballot process. To be eligible to vote by the special absentee ballot, a disabled person must acquire and present a physician's verification statement of disability in addition to his personal sworn statement of disability. A person who is merely going to be absent from his residence is only required to present his personal sworn statement with no other corroboration. Additionally, a disabled absentee voter is required to return the special absentee ballot by mail while a regular absentee voter may choose to return his ballot in person or by mail.

For many physically disabled voters the *only* method by which they can vote is the absentee ballot process. Some disabled voters may only vote by the special absentee ballot because of the nature of their disability prevents attendance at their assigned polling place. Other disabled voters must use the special

absentee ballot not because the nature of their disability limits their attendance at their assigned polling place, but because the state and county boards of election select polling places with physical barriers such as steps and narrow doors which deny entrance to the physically disabled who must use wheelchairs, walkers and other aids to be mobile.

Kentucky does not offer curbside voting or use of paper ballots or other alternative means which would provide a voting mechanism to a disabled person who appears at his polling place on election day and discovers that he cannot enter. In many cases, the final selection of a polling place is not made until one week before an election (App. G, *infra,* 52). Kentucky requires that an application for a special ballot be filed *by mail* seven (7) days prior to the election, KRS 117.075. Kentucky permits the location of any polling place to be changed on election day by notice of the change at the former polling place, KRS 117.065(1). Some physically disabled voters must choose well in advance of the election between voting by the special absentee ballot with its additional requirements or voting at their assigned polling place which may be changed at the last moment and deny them entrance to cast their vote. For this group of disabled voters the special absentee ballot is the only mechanism which assures they can exercise their right to vote in any given election.

The requirement of KRS 117.075(1) that a physician's verification statement be presented in addition to the voter's own sworn statement has three specific

deterrent effects on the physically disabled voter's exercise of the right to vote. First, the voter must ensure that he has timely received the proper application for a *special* absentee ballot. (One of the named petitioners in this case was incorrectly sent the application for a regular absentee ballot and had to request the proper application a second time. (App. D, *infra,* 43).

Second, the physically disabled voter must accomplish a step not required of the regular absentee voter by identifying, seeking out, and, in some cases, visiting, a physician to receive the required verification. A physically disabled person who has no regular physician will have to first find a doctor. The situation must be explained. If a new doctor is involved, the transaction cannot be completed over the telephone or by mail because a physical examination will be necessary. For any physically disabled voter, the verification must be completed and submitted at least seven (7) days before the election and there must be included, in addition to the physician's verification, a personal verified statement. KRS 117.075(1).

The third effect on the disabled absentee voter is the cost of the process. Many voters may be deterred by the possibility of cost and not proceed with an application. Those voters who do proceed with the special ballot process are faced with an unknown financial cost in order to obtain a physician's verification statement. The price to be paid for exercising the right to vote could vary greatly. One voter may not be charged while another may have to bear the cost of an office

visit and a physical examination. The discretion belongs to the physician. A physician may be cautious in stating a person is disabled as he is also subject to the false swearing penalties of KRS 117.995. The financial cost is actual as is the burden of acquiring the statement. In 1977, 215 returned applications; in 1978, 49.

2. The Classification System Imposed by KRS 117.075 Violates the Equal Protection Clause.

Classifications which are drawn imprecisely and fail to clearly demonstrate that they are necessary to promote a compelling state interest or which invidiously discriminate against a class of voters have been found violative of the Equal Protection Clause by this Court. No classification similar to that established by the Kentucky absentee ballot statutes has been addressed by this Court.[3] The Court has reviewed voting classifications such as those based on the length of residency and property ownership of citizens.

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[3]In *McDonald* v. *Board of Election Com'rs of Chicago*, 394 U. S. 802, 89 S. Ct. 1404 (1969), this Court held that Illinois abstentee voting statutes providing for furnishing of absentee ballots to persons who for medical reasons cannot go to polls or will be out of the county do not deny equal protection of the laws for failure to make provisions for furnishing of absentee ballots to persons who are held, before trial, in jails in counties of their residence and who are either charged with nonbailable offenses or who are unable to raise necessary bail. In dicta this Court implied that affidavits verifying disability may be appropriate but the classification issue presented in this case was not squarely before the Court.

In *Kramer, supra,* at 632, a New York statute which limited the franchise in certain school districts to owners or lessees of tangible realty and parents and guardians of children in public schools was held unconstitutional. This Court stated that " . . . The classifications must be tailored so that the exclusion of Appellant and members of his class is necessary to achieve the articulated state goal." In *Dunn* v. *Blumstein, supra,* 405 U. S. at 351, this Court, in ruling Tennessee's durational residency requirement for voting unconstitutional, stated, "A duration resident requirement creates a classification that may in a crude way exclude non-residents from the group. But it also excludes many residents. Given the state's legitimate purpose and the individual interests that are affected, the classification is all too imprecise."

Kentucky has established a classification system which imposes additional burdens on voters solely because they are disabled. In a "crude way", KRS 117.075 and KRS 117.085 draw an imprecise classification which permits a non-disabled voter or a disabled voter who is going to be absent from his community easier access to an absentee ballot without any significant burden than a disabled voter who remains in his community and attempts to use the special absentee ballot.

Kentucky's classification system requires more proof of disability than of absence from the community. The state's additional requirement of a physision's verification statement to corroborate the disabled voter's own sworn statement implies that disabled

voters are considered more fraudulent than voters who are going to be absent from the community. No additional evidence is required of non-disabled voters who use the regular absentee ballot. They only submit their own sworn statement. The state has a legitimate interest in protecting the integrity of elections, but no proof has been submitted indicating that voters are more likely to commit fraud because they are disabled. If the penalty provisions of KRS 117.995 are a sufficient mechanism for the state to address fraud perpetrated by a regular absentee ballot voter who falsely swears, they should be similarly sufficient for a voter who falsely swears that he is disabled. Where "there are other reasonable ways to achieve (the state's) goals with a less burden on constitutionally protected activity, a State may not choose the way with greater interference." *Dunn* v. *Blumstein, supra,* 405 U. S. at 351.

The state can show no compelling interest in requiring the physician's verification statement and it should be granted no deference. As this Court stated in *Kramer, supra,* at 627 and 628:

> And, for these reasons, the deference usually given to the judgment of legislators does not extend to decisions concerning which resident citizens may participate in the election of legislators and other public officials. Those decisions must be carefully scrutinized by the Court to determine whether such resident citizen has, as far as is possible, an equal voice in the selections. Accordingly, when we are reviewing statutes which deny some residents the right to vote, the general pre-

sumption of constitutionality afforded state statutes and the traditional approval given state classifications if the Court can conceive of a "rational basis" for the distinctions made are not applicable. See *Harper* v. *Virginia State Board of Elections*, 383 U. S. 663, 670, 86 S. Ct. 1079, 1983. (1966).

KRS 117.075(1) additionally imposes discriminatory conditions and classifications which have been found to be invidious and violative of the Equal Protection Clause of the Fourteenth Amendment.[4] To impose a doctor's verification statement as a prerequisite to voting is to impose, in effect, a financial cost on the right to vote. A class of disabled voters must spend money to establish their personal integrity and worthiness to vote. No other class of Kentucky voters which seeks to justify its need for an absentee ballot must bear a cost to exercise the franchise in this manner. For all practical purposes, certain disabled voters are

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[4]While physical disability has not yet been recognized by courts as a suspect category, the analytical reasoning used by courts would seem to lead appropriately to that conclusion. Physically disabled individuals have suffered a long history of stereotyped attitudes and assumptions, and unequal treatment. We live today in a society organized and constructed to exclude physically disabled persons. And yet physical disability is, in most cases, like sex and race, an immutable characteristic determined by accident, birth or disease and outside the volition of the disabled individual. Most phsyically disabled individuals are fully capable of performing competently and effectively in the public arena.

Lines which are drawn and facilities which are constructed relegate the entire group of disabled citizens "to an inferior legal status without regard to the actual capabilities of its individual members." *Frontiero* v. *Richardson*, 411 U. S. 677, 93 S. Ct. 1764 (1973).

"not qualified" to vote unless they can pay someone —a physician—to say they are.

> We conclude that a state violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of a fee an electoral standard. Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax.
>
> * * *
>
> *To introduce wealth or payment of a fee as a measure of a voter's qualification is to introduce a capricious or irrelevant factor. The degree of discrimination is irrelevant. Harper* v. *Virginia State Board of Elections,* 383 U. S. 663, 666, 668, 86 S. Ct. 1079, 1081, 1082 (1966). (Emphasis added)

The requirements of KRS 117.075(1) as compared with KRS 117.085(1) are neither less invidious, nor more precisely drawn, than any other classification which has been reviewed under the strict scrutiny test and struck down.

3. Kentucky's Absentee Ballot Provisions Do Not Provide Disabled Persons a Comparable Alternative Means of Voting.

In ruling the Texas absentee voting law unconstitutional, this Court stated in *American Party of Texas, supra,* at 415 U. S. 795,

> . . . it is plain that permitting absentee voting by some classes of voters and denying the privilege to other classes of otherwise qualified voters in similar circumstances *without affording a compar-*

> *able alternative means to vote,* is an arbitrary discrimination violative of the Equal Protective Clause. (Emphasis added)

KRS 117.075 does not provide disabled voters who are otherwise qualified to vote a comparable alternative means. Voters who use the regular absentee ballot or who attend their assigned polling place do not have to meet similar additional burdens and conditions imposed on the disabled voter using the special absentee ballot process. The physician's verification statement and its financial cost is only imposed on the class of disabled absentee voters. No similar verification and cost is imposed on any other class of Kentucky voter who is otherwise qualified. For many disabled perons, no alternative for voting exists other than the absentee ballot mechanism. Many are either unable to attend the polling place because of the nature of their disability or they cannot enter their assigned polling place due to architectural barriers. The conditions imposed by KRS 117.075 directly affects their ability to vote.

B. Under Applicable Decisions of This Court, the Requirement of a Physician's Verification Statement by KRS 117.075 Constitutes a Poll Tax and Is Prohibited by the Twenty-Fourth Amendment.

A disabled citizen who attempts to vote by absentee ballot must bear the financial cost of having a physician complete the verification statement required by KRS 117.075(1). The actual cost to vote is determined by the physician who has complete discretion to charge any amount which he considers appropriate for the

service rendered. This Court has not directly addressed whether a state can require of a particular class of voters an additional condition in order to vote which imposes a financial cost left totally to the discretion of a third party.

In *Harman* v. *Forssenius,* 380 U. S. 528, 85 S. Ct. 1177 (1965), this Court outlined the reasons for the enactment of the Twenty-Fourth Amendment prohibiting poll taxes in federal elections. First, the poll tax "enacted a price for the privilege of exercising the franchise." *Id.,* at 539. It thus resulted in the disenfranchisement of individuals too poor to afford the payment. Similarly, disabled voters may be deterred from seeking an absentee ballot because of an anticipated cost or actually be unable to get a ballot because of their inability to pay a doctor's fee.

Secondly, *Harman, supra,* said the tax frequently had to be paid well before the election and, therefore, deterred voters. Disabled voters must seek out an application from a county clerk, make an appointment and get the doctor's statement in enough time to submit the application seven (7) days before the election. This process requires substantial advance planning in the same way that previously outlawed state poll tax requirements did.

Finally, one reason the poll tax was challenged was its use to disenfranchise a particular group of voters, blacks, in the same way that the doctor's statement is use to disenfranchise the physically disabled. As the Court said in *Harman:*

> It has long been established that a State may not impose a penalty upon those who exercise a right guaranteed by the Constitution. *Frost & Frost Trucking Co.* v. *Railroad Comm'r of California,* 271 U. S. 583 . "Constitutional rights would be of little value if they could be . . . indirectly denied.' *Smith* v. *Allwright,* 321 U. S. 649, 664, or "manipulated out of existence." *Gomillion* v. *Lightfoot,* 364 U. S. 339, 345. Significantly, the Twenty-Fourth Amendment does not merely insure that the franchise should not be "denied" by reason of failure to pay the poll tax; it expressly guarantees that the right to vote shall not be "denied or abridged" for that reason. Thus, like the Fifteenth Amendment, the Twenty-Fourth "nullifies sophisticated, as well as simple-minded, modes" of impairing the right guaranteed. *Lane* v. *Wilson,* 307 U. S. 268, 275. "It hits onerous procedural requirements which effectively handicap exercise of the franchise" by those claiming the constitutional immunity. *Ibid;* Cf. *Gray* v. *Johnson,* 234 F. Supp. 743 (D.C.S.D. Miss.); *Harman, supra,* pp. 540-541.

It is clear from the *Harman* analysis that the Court should examine not what the burden is called but its effect.

The Twenty-Fourth Amendment prohibits any burden imposed by the state, whether financial or procedural, upon the right to vote in federal elections. It is inappropriate to conclude as the lower courts did that because the doctor's fee is not payable to the state, it does not violate the constitutional prohibition. The state imposes the requirement of the statement

with its inevitable attendant fee as a qualification which must be met in order for a disabled person to vote. If the Amendment was read only to prohibit payments made directly to the State, any state could constitutionally impose a poll tax and make it payable to a private charity. Such a narrow construction would defeat the purpose of the Twenty-Fourth Amendment.

The District Court's awkward analogy of the cost of the doctor's statement to the payment for the cost of gas to get to the polls misses the point. The doctor's statement requirement and its cost is imposed by the state as a qualification for voting; the cost of gas incurred by some voters is an incidental factor not mandated by the state but determined by a voter who freely selects a means of transportation. The State conditions certain disabled persons' right to vote upon providing the physician's verification statement. It is not an incidental factor. It is *required.* For disabled voters who cannot vote at their polling places, either because they are to ill to get there or because of architectural barriers at the polls, the requirement of a doctor's statement is a direct burden placed on their right to vote. *Garrity* v. *New Jersey,* 385 U. S. 493 (1967). The sophistication of the device does not make it less violative of the Twenty-Fourth Amendment. In fact, the sophistication of the device supports Petitioners' position that a close examination of the facts should be permitted by the Court prior to any ultimate ruling as to the device's legality.

II. Dismissal of Petitioners' Claims on the Pleadings Is In Conflict With Decisions of This Court Which Strongly Favor the Taking of Proof and Determination on the Merits of Civil Rights Claims Which Implicate the Right to Vote.

A. The Court Has Consistently Favored Examination of Civil Rights Claims on the Merits, With the Opportunity for the Civil Rights Plaintiff to Present Proof in Support of His Claims.

It is in the context of civil rights cases that this Court has most often addressed the standard for reviewing the sufficiency of a complaint before the reception of evidence. E.g., see *Scheuer* v. *Rhodes,* 416 U. S. 232, 94 S. Ct. 1683 (1974); *Jenkins* v. *McKeithen,* 395 U. S. 411, 89 S. Ct. 1843 (1969); *Conley* v. *Gibson,* 355 U. S. 41, 78 S. Ct. 99 (1957). In each such instance, the Court has stressed that the complaint "is to be liberally construed in favor of the plaintiff," *Jenkins, supra,* 395 U. S. at 421, and should not be dismissed "unless it appears *beyond doubt* that the plaintiff can prove no set of facts in support of his claims which would entitled him to relief." *Conley* v. *Gibson, supra,* 355 U. S. at 45-46 (emphasis added). *Scheuer, supra,* 416 U. S. at 236.

In *Scheuer* v. *Rhodes, supra,* the Court was confronted with a case in a procedural posture identical to that presented by Petitioners' case. The *Scheuer* complaints, which raised claims alleging violation of the civil rights of students killed at Kent State University during civil disorders in 1970, were dismissed by the district court for lack of jurisdiction "without

the filing of an answer to any of the complaints." *Id.*, 416 U. S. at 235. The Court in *Scheuer* quickly focused on whether the Court erred in "precluding any opportunity for the plaintiffs by subsequent proof to establish a claim," by holding:

> The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test.

Id., 416 U. S. at 236. Citing to *Conley* v. *Gibson*, *supra*, 355 U. S. 41, 45-46, the Court in *Scheuer* reaffirmed that dismissal of a civil rights complaint is strongly disfavored unless there is simply no doubt that no colorable claim has been asserted. *Id.*, 416 U. S. at 236.

Thus, even though one might have contended that the chances of the *Scheuer* plaintiffs prevailing was "very remote and unlikely," the Court deemed it vital that their civil rights claims be examined with the benefit of "all the circumstances that may be revealed by evidence." *Id.*, 416 U. S. at 239. To accomplish this end, the Court directed that the *Scheuer* plaintiffs be afforded the opportunity to submit their claims to the rigors of a motion for summary judgment or trial on the merits. *Id.*, 416 U. S. at 250.

Similarly, in *Jenkins* v. *McKeithen*, *supra*, the Court reversed a dismissal of a complaint in which the plaintiffs raised a constitutional challenge to a

Louisiana statute pertaining to a state investigatory body with responsibility for labor-management relations. On its facts, *Jenkins* implicates far less important constitutional values than those presented by Petitioners who raise a constitutional challenge to a state statute affecting the right to vote. Yet in *Jenkins*, even though the complaint had been "inartfully drawn," 395 U. S. at 422, the Court viewed it essential to examine that civil rights complaint in the context of an adequate evidentiary proceeding rather than permit the outright dismissal of the complaint, without affording the plaintiffs an opportunity to prove their case. 395 U. S. at 431-432; *cf. Scheuer, supra,* 416 U. S. at 239.

Petitioners' claims require nothing less. Petitioners submit that their Complaint sets forth ample testament to the substantial impediments and obstacles experienced only by disabled voters when they attempt to exercise their fundamental right to vote, either at their polling place or through the absentee ballot process forced upon them for lack of any other means of participation. It is immaterial that Petitioners may fail to prove their case. *Scheuer* v. *Rhodes, supra,* 416 U. S. at 236. What is material and important is that they raise claims which merit examination on an evidentiary record. *McDonald* v. *Board of Election Com'rs of Chicago,* 394 U. S. 802, 807 (1969); *O'Brien* v. *Skinner,* 414 U. S. 524, 529 (1974); *Goosby* v. *Osser,* 409 U. S. 512, 522 (1973).

B. Specifically, the Court in *Goosby* v. *Osser* Has Announced That Constitutional Challenges to Absentee Ballot Procedures Should be Determined on the Merits.

In a series of cases involving absentee ballots, the Court has stressed the "fact specific" nature of its inquiry whenever it examines burdens placed upon a class of voters who are being treated differently than other voters.[5] In *McDonald* v. *Board of Election Com'rs of Chicago, supra,* upon which the district court relies so heavily, the Court based its decision in substantial part on the conclusion that, on the facts in that case, "there is nothing in the record to indicate that the [state] statutory scheme has an impact on the [plaintiff's] ability to exercise the fundamental right to vote." *McDonald, supra,* 394 U. S. at 807 (emphasis added). As the Supreme Court observed in its subsequent decision, *O'Brien* v. *Skinner, supra,* "[e]ssentially the Court's disposition of the claims in *McDonald* rested on failure of proof."

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[5]In its review of restrictions on the voting franchise, the Supreme Court has in uniform fashion scrutinized the practical effect of the statutory scheme or practice being challenged, and has not felt constrained to limit its inquiry merely because of the legal label or characterization proffered by defendants. The Court's inquiry has always been fact specific in order to assess whether the classification: "may *dilute* the effectiveness of some citizens' votes," *Kramer* v. *Union Free School District,* 395 U. S. 621, 626 (1969); infringes upon "the opportunity for equal participation by all voters," *Reynolds* v. *Sims,* 377 U. S. 533, 566 (1964), particularly by basing the classification to vote on wealth, *Harper* v. *Virginia State Board of Elections,* 383 U. S. 663, 666-70 (1966); or otherwise has a direct or indirect effect of limiting one's ability to vote. *Dunn* v. *Blumstein,* 405 U. S. 330, 335 (1972); *Harman* v. *Forssenius,* 380 U. S. 528, 540-41 (1965).

The Court has acknowledged that the particular facts of individual cases involving absentee ballots may demonstrate that the statutory scheme impermissibly infringes the fundamental right to vote. *O'Brien* v. *Skinner, supra; American Party of Texas* v. *White, supra,* 415 at 795. Yet, by dismissing Petitioners' Complaint, the District Court has denied Petitioners the opportunity to prove their case. As the Court observed in *O'Brien, supra,* it is simply not enough for state defendants and the District Court to summarily assert that "the challenged statutes 'have no direct impact on [the] right to vote.' " 414 U. S. at 532. (Marshall, J., concurring). Such statements must be based upon facts, not mere assumption. It is just such assumptions which were soundly rejected by the Court in *O'Brien, supra,* which had the benefit of a properly developed trial record.

Goosby v. *Osser,* 409 U. S. 512, 93 S. Ct. 854 (1973), another case in which the Court reviewed a constitutional challenge to absentee ballot procedures, provides direct procedural and substantive analogy to Petitioners' case. In *Goosby,* the trial court dismissed the plaintiffs' compliant on the pleadings, which clearly alleged, as do Petitioners here, that the absentee ballot statutory scheme effectively abridges their right to vote. *Goosby,* 409 U. S. at 521. The Third Circuit affirmed the dismissal with the view that the plaintiffs' "constitutional claims were wholly insubstantial under *McDonald* v. *Board of Education Comm'rs.*" See *Goosby, supra,* 409 U. S. at 516.

This Court in *Goosby* unanimously rejected the lower court analysis. In *Goosby,* the Court unequivocally stated that *McDonald* was not to be construed as foreclosing such constitutional challenges to statutory schemes providing for voting by absentee ballots. *Goosby, supra,* 409 U. S. at 522. The Court quite properly offered no view on the merits of the plaintiffs' claims in *Goosby* but instead simply directed that the trial court "hear and determine the merits of petitioners' conditional claims." *Id.*

Petitioners submit that the District Court herein has committed essentially the same error which was reversed in *Goosby.* The District Court here in effect admits as much when it acknowledges that *McDonald* "may arguably be said to have been at least partially overruled in *O'Brien* v. *Skinner,* 414 U. S. 524, 94 S. Ct. 740 (1974)." (App. C, *infra,* 36-42). In the face of its own reservations about the meaning of *McDonald,* the District Court proceeds to quote extensively from *McDonald* and quite plainly construes that case as foreclosing Petitioner's claims, on the *assumptions* that the Kentucky statutory scheme is rational and that there is no adverse effect to Petitioners' interests which results. (App. C, *infra,* 36-42). The District Court reaches these conclusions without any significant discussion of the allegations in Petitioners' Complaint and without any recognition of this Court's holding in *Goosby* v. *Osser, supra,* even though that precedent had been briefed to the trial court.

The District Court erroneously dismissed Petitioners' constitutional challenge to Kentucky absentee

ballot procedures and practices, which were alleged to impair dramatically disabled voters' right to vote. Petitioners are entitled to the opportunity to prove that the challenged statute and its practical implementation unnecessarily restricts and effectively abridges Petitioners' participation in the voting franchise, and that Respondents' contentions to the contrary "fly in the face of reality." *O'Brien* v. *Skinner, supra,* 414 U. S. at 532-533. (Marshall, J., concurring.) What is indeed reality in fact requires that Petitioners' claims be heard on the merits. *Goosby* v. *Osser,* 409 U. S. at 522. Petitioners should be permitted to take the risk of a "failure of proof." *O'Brien, supra,* 414 U. S. at 529.

C. The District Court Committed Error by Making Assumptions of Fact Which Are Inconsistent With Petitioners' Allegations.

For the purpose of ruling on a motion to dismiss, the material allegations of the Complaint are to be accepted as true. *Jenkins, supra,* 395 U. S. at 421; *Walker Process Equipment Inc.* v. *Food Machinery & Chemical Corp.,* 382 U. S. 172, 174-175, 86 S. Ct. 347, 348-349 (1965).

The District Court has failed to honor this basic axiom. The most striking deficiency in the District Court memorandum is its utter failure to address the factual allegations of Petitioners' Complaint and the reasonable inferences which should be liberally and favorably drawn in support of a colorable claim. *Jenkins, supra.* The responsibility to construe pleadings favorably to a plaintiff is even greater where the com-

plaint asserts the violation of civil rights. E.g., *Westlake* v. *Lucas*, 537 F. 2d 857, 858 (6th Cir. 1976). The District Court errs to the extent it has construed the Complaint narrowly and makes inferences adverse to plaintiffs' claims. E.g., *Illinois Migrant Council* v. *Campbell Soup Co.*, 519 F. 2d 391, 394-395 (7th Cir. 1975).

The District Court has committed such error in this case. For example, the District Court summarily concludes, without any factual discussion or allusion to the Complaint, that this case "does not involve the denial of the right to vote." (App. C, *infra*, 36-42). It is precisely this erroneous factual assumption which the District Court then applies against its misreading of *McDonald, supra.* In effect, the District Court has dismissed Petitioners' Complaint not on a fair construction of the pleadings but instead on its own unsubstantiated assumptions of fact.

This approach has been rejected by this Court. Not only should such cases be determined on their merits and not dismissed at the pleading stage, *Goosby, supra,* but also it is plainly inadequate to reject Petitioners' claims with the conclusionary assertion that the case involves "merely a claimed right to absentee ballots" and "not the right to vote." See *O'Brien, supra,* 414 U. S. at 532. Yet, that is exactly what the District Court has done here. As such, the order of dismissal should be reversed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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PROOF OF SERVICE

I, Geneva F. Perry, the counsel for the petitioners, hereby certify that three (3) copies of the foregoing Petition for a Writ of Certiorari were mailed, first class postage prepaid, to Steven Frank, Assistant Attorney General, Capitol Building, Frankfort, Kentucky 40601; J. Matthew Carey, County Attorney, Jefferson County, 2720 Citizens Plaza, Louisville, Kentucky 40202; and Hite Hays, County Attorney, Courthouse, 501 Main Street, Shelbyville, Kentucky 40065, this 17th day of November, 1981.

Geneva F. Perry

GENEVA F. PERRY

Attorney for Petitioners

APPENDIX

APENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 81-5152

PRIME MOVERS, INC.,
KATHERINE F. IRVIN,
DONALD R. SULLIVAN, - - - *Plaintiffs-Appellants*

v.

KENTUCKY BOARD OF ELECTIONS,
FRANCES JONES MILLS,
BRADY A. MIRACLE,
JEFFERSON COUNTY BOARD OF ELECTIONS,
BREMER EHRLER,
SHELBY COUNTY BOARD OF ELECTIONS,
SUE PERRY, - - - - - *Defendants-Appellees*

ORDER—Filed July 17, 1981

Before: WEICK, ENGEL and JONES, Circuit Judges.

For the reasons set forth in the Order and Memorandum filed by United States District Judge Thomas A. Ballantine, Jr. in the district court on February 6, 1981, and because there is no merit to plaintiffs' claim that the facts set forth in the complaint which were used in an attempt to invoke the pendent jurisdiction of the district court also stated a federal claim that plaintiffs' rights under the Fourteenth and Twenty-fourth Amendments were violated,

IT IS ORDERED that the judgment of the district court is affirmed.

Judge Jones dissents. He would vacate the judgment and remand for trial on the question of the discriminatory

disparate impact on the exercise of voting rights by disabled voters caused by the requirement that they procure a signed medical statement before being allowed to vote by absentee ballot.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 81-5152

PRIME MOVERS, INC., Et Al., - - *Plaintiffs-Appellants*

v.

THE KENTUCKY BOARD OF ELECTIONS,
Et Al., - - - - - - *Defendants-Appellees*

ORDER—Filed September 18, 1981

Before: WEICK, ENGEL and JONES, Circuit Judges

No judge in regular active service of the court having requested a vote on the suggestion for a rehearing en banc, the petition for rehearing filed herein by the plaintiffs-appellants has been referred to the panel which heard the original appeal. Upon consideration of said petition, the court finding no issues presented which have not been previously considered,

IT IS ORDERED that the petition for rehearing en banc be and it is hereby denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

APPENDIX C

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

No. C 80-0527-L(B)

PRIME MOVERS, INC., et al. - - - - *Plaintiffs*

v.

THE KENTUCKY BOARD OF ELECTIONS, et al. - *Defendants*

ORDER—Entered February 6, 1981

For the reasons set forth in the Memorandum filed this date,

IT IS ORDERED that the motion of the defendants, Kentucky Board of Elections, Frances Jones Mills, Brady A. Miracle, Jefferson County Board of Elections, Bremer Ehrler, Shelby County Board of Elections and Sue Perry, to dismiss the complaint of the plaintiffs, Prime Movers, Inc., Katherine F. Irvin and Donald R. Sullivan, against them be and it is hereby granted; and this action is dismissed with prejudice.

There is no just reason for delay, and this is a final and appealable Order.

This 6th day of February, 1981.

(s) Thomas A. Ballantine, Jr.
United States District Judge

Copies to:
Counsel of record

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

No. C 80-0527-L(B)

PRIME MOVERS, INC., et al. - - - - *Plaintiffs*

v.

THE KENTUCKY BOARD OF ELECTIONS, et al. - *Defendants*

MEMORANDUM—Entered February 6, 1981

On October 23, 1980, at the eleventh hour before the expiration of time for the application for special ballots, the Court granted plaintiffs' motion for a temporary restraining order and restrained defendants from refusing to issue ballots to disabled persons otherwise qualified to vote if the application was unaccompanied by a physician's certificate of the voter's disability. The Court entered the order because of the press of time since the Presidential election was less than two weeks off. The matter is now before the Court on the motion of the defendants to dismiss.

I.

Plaintiffs' complaint challenges the constitutionality of KRS 117.075, titled "Special ballots for disabled voter." In essence, that statute provides that one disabled by age, illness or infirmity, may apply by mail to the County Clerk for a special ballot. The application is required to be accompanied by the verified statement of a physician that the applicant is disabled.

The thrust of plaintiffs' complaint is that the requirement that the disabled voter accompany his or her application with a physician's statement deprives the voter of equal protection. They bottom this argument on the fact that voters who apply for absentee ballots are not required to furnish any supporting documentation of their representation that they will be absent from the county on election day. KRS 117.085.[1]

Borrowing the language of the Supreme Court in *Kramer* v. *Union 3 School District,* 395 U. S. 621, 89 S. Ct. 1886 (1969): "At the outset it is important to note what is *not* at issue in this case." (Emphasis in original.) 395 U. S. at 625, 89 S. Ct. at 1888. This case does not involve the denial of the right to vote. It involves the right to reserve a special ballot.

The matter of special ballots has been the subject of scrutiny in a number of cases. In *McDonald* v. *Board of Election Com'rs of Chicago,* 394 U. S. 802, 89 S. Ct. 1404 (1969), the Court considered an Illinois statute dealing with absentee ballots. While the holding in that case may arguably be said to have been at least partially overruled in *O'Brien* v. *Skinner,* 414 U. S. 524, 94 S. Ct. 740 (1974), we believe that the following language is instructive:

> "Though the wide leeway allowed the States by the Fourteenth Amendment to enact legislation that appear to affect similarly situated people differently, and the presumption of statutory validity that adheres thereto, admit of no settled formula, some basic guidelines have been firmly fixed. The distinctions drawn by a challenged statute must bear some rational relationship to a legitimate state end and will be set aside as violative of the Equal Protection Clause only if

[1]This section also treats persons confined in jail but not yet convicted of the crime charged.

based on reasons totally unrelated to the pursuit of that goal. Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them. (Citations omitted.) With this much discretion, a legislature traditionally has been allowed to take reform 'one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind,' Williamson v. Lee Optical of Oklahoma, Inc., 348 U. S. 483, 489, 75 S. Ct 461, 465, 99 L. Ed. 563 (1955); and a legislature need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked." 394 U. S. at 808, 89 S. Ct. at 1408.

We further find implied approval of the Illinois requirement that disabled persons (such as plaintiffs here) furnish affidavits from physicians:

"[i]t seems quite reasonable for Illinois' Legislature to treat differently the physically handicapped, who must, after all, present affidavits from their physicians attesting to an absolute inability to appear personally at the polls in order to qualify for an absentee ballot. Illinois could, of course, make voting easier for all concerned by extending absentee voting privileges to those in appellants' class." 394 U. S. at 809, 89 S. Ct. at 1409.

We start with the basic proposition that once the State grants the franchise to the electorate, lines may not be drawn which are inconsistent with the equal protection clause of the Fourteenth Amendment. *Harper* v. *Virginia*

State Board of Elections, 383 U. S. 663, 86 S. Ct. 1079 (1966). As we have pointed out, however, plaintiffs are not being denied the franchise.

We next adopt the proposition that preservation of the integrity of the electoral process is a legitimate and valid State goal. *Rosario* v. *Rockefeller*, 410 U. S. 752, 761, 93 S. Ct. 1245, 1251 (1973). We conclude that wide leeway is allowed the General Assembly to enact legislation that appears to affect similarly situated people differently. *McDonald, supra.* Defendants argue that disability *vel non* is a medical question and that in granting the privilege of voting by special ballot, the General Assembly may properly impose reasonable conditions upon the issuance of a special ballot. We agree. We are cited to no authority to the effect that voting by special ballot is an absolute right. State courts generally have held that absentee voting is a privilege. See, e.g., *Hallahan* v. *Mittlebeeler*,, Ky., 373 S. W. 2d 726 (1963) and 26 Am. Jur. 2d Elections, Section 243.

If the Court accepts plaintiffs' arguments and if the Court were to hold the statute in question unconstitutional, we would be acting as a superlegislature. The wisdom or folly of legislation is not for us to decide. Relief, if it be needed, lies with the General Assembly of Kentucky. *Ferguson* v. *Skupra*, 372 U. S. 726, 83 S. Ct. 1028 (1963). The General Assembly may implement its programs step-by-step, *Katzenbach* v. *Morgan*, 384 U. S. 641, 86 S. Ct. 1717 (1966), and that is exactly what is has done.

We hold that KRS 117.085 does not offend the due process clause of the Fourteenth Amendment.

II.

Plaintiffs' argument that the statute violates the Fifteenth Amendment is without merit. Assuming arguendo

the plaintiffs have been denied the right to vote (and there is no suggestion that they have) the denial is not based on race, color or previous condition of servitude.

III.

We likewise reject plaintiffs' argument that the possibility that the certifying physician would charge a fee creates an indirect poll tax. "Tax" is a common word which should require no definition, but we will furnish one nonetheless. It is "a charge usually of money imposed by authority upon persons or property for public purposes." *Webster's New Collegiate Dictionary,* 1977. Were we to follow plaintiffs' argument to its ultimate conclusion, we would have to conclude that the cost of gasoline or any other costs of transportation to the polling place is likewise an indirect poll tax.

We conclude that plaintiffs' allegation that their 24th Amendment rights have been violated is likewise without merit.

IV.

Having determined that KRS 117.075 is constitutional, we conclude that this is not the proper case for the exercise of pendent jurisdiction over the claims of plaintiffs that violations of certain Kentucky administrative regulations dealing with accessibility to public buildings by handicapped persons should be enjoined. We hold that the two claims asserted by plaintiffs do not have a common nucleus of operative fact. As was said in *United Mine Workers of America* v. *Gibbs,* 383 U. S. 715, 86 S. Ct. 1130 (1966):

> "Pendent jurisdiction, in the sense of judicial *power,* exists whenever there is a claim 'arising under [the]

> Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority * * *,' U. S. Const., Art. III, §2, and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional 'case.' The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. (Citation omitted.) The state and federal claims must derive from a common nucleus of operative fact. But, if considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole.
>
> That power need not be exercised in every case in which it is found to exist. It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right." (Emphasis in original.) 383 U. S. at 725, 86 S. Ct. at 1138.

We decline to accept pendent jurisdiction and defendants' motion to dismiss will be granted.

An appropriate Order has been entered this 6th day of February, 1981.

(s) Thomas A. Ballantine, Jr.
United States District Judge

Copies to:

Counsel of record

APPENDIX D

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. _____

PRIME MOVERS, INC., et al. - - - - *Plaintiffs,*

v.

KENTUCKY BOARD OF ELECTIONS, et al. - - *Defendants.*

AFFIDAVIT OF KATHERINE F. IRVIN

Affiant, Katherine F. Irvin, after being duly sworn, states as follows:

I am a white female residing in Jefferson County, Kentucky. I am registered to vote in Kentucky at my address at 8600 LeGrange Road in County A, precinct 44. I have never been declared incompetent by any court.

I am a quadriplegic as a result of polio, and I utilize an electric wheelchair. I have never voted by the special absentee ballot established by KRS 117.075, nor have I submitted an application or doctor's statement for such an absentee ballot since at least 1977.

On November 4, 1980, which is Election Day, my attendant will be out of town and I will have no way to get to my polling place, which is located at the Lyndon Firehouse about three miles from my residence. The only public transportation which would be available to me is Carevan, which will charge a minimum of $15.00 to transport me to my polling place.

I have requested an application for a special absentee ballot for disabled people by telephone from the office of the Jefferson County Clerk, Bremer Ehrler. However, they mistakenly sent me an application for the regular absentee ballot for which I am not eligible. I again requested the application for a special absentee ballot and have since received it.

If I apply for the special absentee ballot, I will have to send the application to my physician or make a special visit to have him complete the form. I believe that my doctor may submit a bill to me for completing the form.

(s) Katherine F. Irvin, Affiant

Subscribed and sworn to before me by Katherine F. Irvin this 20th day of October, 1980.

My commission expires: April 18, 1981

(s) Sara L. Pratt
Notary Public
Ky. State at Large

APPENDIX E

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. _____

PRIME MOVERS, INC., et al. - - - - *Plaintiffs,*

v.

KENTUCKY BOARD OF ELECTIONS, et al. - - *Defendants.*

AFFIDAVIT OF DONALD R. SULLIVAN

Affiant, Donald R. Sullivan, after being duly sworn, states as follows:

I am a thirty-two year old black male residing in Shelbyville, Kentucky. I am registered to vote in Kentucky at my Shelbyville address. I have never been declared incompetent by any court.

I have a medical condition known as "soft bones", and I usually use a brace and crutches to move about. Howeven, on June 23, 1980, I was involved in a car accident and from that time until the present I have been unable to leave the house and my doctor cannot tell me when I will be able to do so.

I have never voted by the special absentee ballot established by KRS 117.075, nor have I ever submitted an application or doctor's statement for such an absentee ballot. I have requested an application for the special absentee ballot for the 1980 General Election.

When I apply for the ballot, I will be required to fill out the application, send it to my physician in Louisville,

and then return it to the clerk's offiice. I believe that my doctor may submit a bill to me for filling out the form.

Even if I am able to get out of my house by Election Day, I expect to have to use a wheelchair. My polling place is located in West Middle School in Shelbyville, precinct 2, and to my knowledge it has several steps and is not accessible to wheelchairs, so that I would not be able to enter to cast my vote.

(s) Donald R. Sullivan, Affiant

Subscribed and sworn to before me by Donald R. Sullivan this 20th day of October, 1980.

My commission expires: April 18, 1981

(s) Sara L. Pratt
Notary Public
Ky. State at Large

APPENDIX F

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. _____

PRIME MOVERS, INC., et al. - - - - *Plaintiffs,*

v.

KENTUCKY BOARD OF ELECTIONS, et al. - *Defendants.*

AFFIDAVIT OF EILEEN ORDOVER

Affiant, Eileen Ordover, after being duly sworn, states as follows:

In 1979, I was employed as staff for Prime Movers, Inc. As part of my responsibilities, I conducted reseach on the issue of voting rights and practices as they related to physically disabled citizens in Jefferson County, Kentucky.

The project included the use of the special absentee ballot for disabled voters established by KRS 117.075, and the use of polling places by physically disabled voters. My research had three basic components:

1. Compilation and evaluation of data from the files of the Jefferson County Clerk's office pertaining to applicants for and users of the special absentee ballot in the 1977 and 1978 General Elections.

2. A written survey of applicants for the special absentee ballot in those two years dealing with voting needs and experiences.

3. A visual survey of a random sampling of polling places used in Jefferson County during the 1978 General Election for accessibility to physically disabled individuals.

The survey respondents generally expressed dissatisfaction with the voting options available to them and the survey of a random sampling of polling places indicated that 52% of them were inaccessible to physically disabled individuals because of steps, curbs, narrow doors, steep inclines, etc. One survey respondent commented:

> "I have contacted the Jefferson County Clerk's office to inform [them] that the new polling place is not accessible to me in my wheelchair . . . they . . . encouraged me to vote by absentee ballot. I feel very strongly that all voting places should be accessible to the handicapped. I prefer to vote *on* Election Day."

Another respondent who voted by absentee ballot because of an inaccessible polling place was also concerned about voting prior to Election Day. Asked, "Might you have voted differently if you could have voted on Election Day?" he replied, "In 1978, I would have. In 1977 I might have."

Survey respondents also complained of the burden involved in using the special absentee ballot for disabled voters. When asked, "Do you plan to vote by using the special absentee ballot again?" one individual replied, "I would prefer to vote at the regular polling place as the absentee ballot is a nuisance to try to get." Fifty-five survey respondents voted by absentee ballot in 1977 or 1978, but not both years; 13.6% of those who voted in only one of those years stated that they did not vote in the other year on account of the trouble involved in obtaining the special absentee ballot.

Two people reported having to make two trips to the County Clerk's office in order to get an application for the ballot. One individual reported that in both 1977 and 1978, she received the ballot too late to return it by the legal deadline. Another was first sent the ballot used by able-bodied voters and claims to have almost missed the deadline because of the resulting delay.

Examination of records of the Jefferson County Clerk revealed that 14.6% of the registered voters who applied for the special absentee ballot in 1977 and 1978 did not get ballots, due to procedural problems. In the 1977 General Election, 243 individuals applied for the special absentee ballot; 236 were sent ballots and 215 cast actually recorded votes. Twenty-eight people for one reason or another did not complete the process by actually casting a recorded vote. In 1978 sixty-five ballots were sent to disabled applicants, forty-nine were returned and counted, and sixteen did not complete the process, for some reason. The reasons for failing to complete the process were understood to include missing the statutory deadline for applying, loss of application through the mail, failure to obtain a physician's statement or failure to return the ballot. One respondent expressed concern over what he saw as the uncertainties involved in using the Special Absentee Ballot. Asked if he had received the ballot in time to mail it back and have the County Clerk's office receive it by 3:00 p.m. on Election Day, he replied that while he had mailed the ballot, he had no idea if it was ever delivered and, if so, whether it was delivered on time and actually counted.

Many survey respondents objected to the required physician's statement, with comments such as:

> "People who are going to be out of town may vote by absentee ballot and do not have to have it signed by

> anyone other than themselves. I feel that the disabled should have the privilege to be just as truthful."
>
> and
>
> "It is too difficult getting to the doctor's office . . . I do not like going for a doctor's signature as I only go to the doctor when I am ill . . . I have no need for check-ups. To me it is an imposition to ask the doctor for free service."

Forty percent of the survey respondents stated that they, or a friend or family member, had to visit the doctor in order to get the physician's statement. Eleven percent said that they had to have a physical examination. Ten percent reported having to pay a fee to be examined in order to get the physician's statement for the special absentee ballot application.

In analyzing data obtained from the files of the Jefferson County Clerk, I found that in 1977 and 1978 the special absentee ballot was used predominantly by elderly people; 73.5% of all disabled absentee voters in those two years were sixty-five years of age or older. Twenty-seven percent of the survey respondents indicated that they were nursing home residents; 15% said that they obtained the physician's statement from a nursing home physician. According to their applications for the special absentee ballot, sixteen residents of one nursing home had their physician's statement signed by the same doctor in 1977. Fifteen residents in each of two other facilities had a single doctor sign the statement. Several survey respondents stated that the social service office of their nursing home provided residents with absentee ballot applications.

Another concern expressed by disabled voters responding to the survey was what they perceived as the difficulty in finding out about the existence of the special absentee

ballot. One individual said that, "The election board does not give adequate pre-election day publicity to the absentee ballot being available. By the time they have an item in the paper, it is too late to write for a ballot, send to doctor and return same . . ." Eight survey respondents said that they first learned of the special absentee ballot through the initiative of the County Clerk's office. Sixty percent said they learned of it through personal initiative. Six percent reported learning of the ballot from partisan campaign workers, 4% from health or social workers, 4% from precinct captains canvassing door-to-door, and 6% from other sources. In total, 84% of the survey respondents stated they first learned of the special absentee ballot for disabled voters from channels outside of the Jefferson County Clerk's office.

The results of my research and the surveys referred to herein have been compiled into a report entitled *Disabled Voter Participation: An Analysis.* A copy is attached hereto and incorporated herein by reference.

(s) Eileen Ordover, Affiant

Subscribed and sworn to before me by Eileen Ordover this 21st day of October, 1980.

My commisson expires: April 18, 1981.

(s) Sara L. Pratt
Notary Public
Ky. State at Large

APPENDIX G

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 81-5152

PRIME MOVERS, INC., Et Al. - *Plaintiffs-Appellants*

v.

KENTUCKY BOARD OF ELECTIONS,
Et Al. - - - - - *Defendants-Appellees*

AFFIDAVIT

Comes the Affiant, TINA WITT, being duly sworn, states as follows:

I am an employee of Prime Movers, Inc.

During the past month, I have spoken with a number of physically disabled individuals about their experiences in attempting to vote at their polling places and using the special absentee ballot for disabled persons. Based on these conversations, I have asked the office of the Jefferson County Clerk, Bremer Ehrler, for information about specific polling places for four individuals in Jefferson County and I have asked the office of the Shelby County Clerk, Sue Perry, for information about specific polling places for one individual in Shelby County. Both offices told me that final information on which polling places were to be used in the May 26th primary would not be available until the week before the election, so I requested information on the pol-

ling place for that precinct which was used in the election of November 4, 1980.

After identifying the polling place for each of the five individuals, I visited each location and surveyed each entrance I was able to locate for the existence of steps, curbs, ramps, and/or other methods of approach and entrance.

The information which I have gathered is as follows:

Katherine F. Irvin, is a quadriplegic who uses an electric wheelchair. The polling place for her precinct is located in the Albert E. Bowen Elementary school. To get to the main entrance to the school from the street, it is necessary to go up a five-inch curb. There is a rear entrance to the kitchen which does not have a curb because there is a driveway. The polling place at the school is usually in the gymnasium area. I did not go inside the school to see if there are architectural barriers inside and I do not know if it is possible to get through the kitchen in a wheelchair. Katherine Irvin has not submitted a doctor's verification of her disability in support of an application for a special absentee ballot since at least 1977. If she is unable to vote at her polling place because of architectural barriers or her disability, she will be required by Kentucky Law to submit an application for the absentee ballot with a doctor's verification of her disability by mail at least seven days before the election.

Jeff Burgin is in a wheelchair as a result of an automobile accident . The polling place for his precinct is located at the Lebanese-American Club on River Road. There is one six-inch step to reach the entrance to the polling place. He has never voted by special absentee ballot or submitted a doctor's verification of his disability with an application for a special absentee ballot. If he seeks an special absentee ballot, he will be required to visit

a doctor and provide a doctor's verification of disability along with his application.

Sharon Hubsch is in a wheelchair as a result of multiple-sclerosis. The polling place for her precinct is located at Immaculate Church, Lower Hunter's Trace. To get to the polling place from the street, it is necessary to go up a six-inch curb. Sharon Hubsch has applied for the special absentee ballot for previous elections and was required to pay a fee to get the doctor's signature on her application. She was unable to vote by special absentee ballot in the November 1980 election because she did not receive the ballot from the office of the clerk until the day before the election and therefore she was required to vote at her polling place.

Charles Powers uses a wheelchair as a result of a gunshot wound. The polling place for his residence in November, 1980 was 1424 28th Street. To get to the polling place from the street, it is necessary to go up a curb and then up three steps to the front door of the residence.

Power's polling place for his present precinct, according to the office of the Jefferson County Clerk, is likely to be located at Shawnee High School. To enter the polling place from the street, it is necessary to go up one five-inch curb, and then up several steps to the entrance. Although he would prefer to vote at his polling place if there was no architectural barriers, he might use the special absentee ballot to avoid being carried into his polling place. However, he has never submitted an application for the special absentee ballot with a doctor's verification of his disability, and to do so he would have to visit a doctor and perhaps pay a fee before he could vote.

On May 14, I called the office of the Jefferson County Clerk to find out when they could confirm which polling places will be utilized in the May 26 primary. That information will be available May 18 or 19, one week before the election.

/s/ Tina Witt, Affiant

Subscribed and sworn to before me this 15th day of May, 1981 by Tina Witt, the Affiant.

My Commission Expires: July 29, 1981.

/s/ Nancy S. Travis
Notary Public, State-at-Large, Ky.

Opposition

Office - Supreme Court, U.S.
FILED
DEC 21 1981
ALEXANDER L. STEVAS,
CLERK

81-943

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

PRIME MOVERS, INC.;
KATHERINE F. IRVIN; and
DONALD R. SULLIVAN - - - - Petitioners

versus

KENTUCKY BOARD OF ELECTIONS;
THE HONORABLE FRANCES JONES MILLS, Secretary of State and Chairperson of the Kentucky Board of Elections;
BRADY A. MIRACLE, Executive Director, Kentucky Board of Elections;
JEFFERSON COUNTY BOARD OF ELECTIONS;
BREMER EHRLER, Jefferson County Clerk and Chairperson, Jefferson County Board of Elections;
SHELBY COUNTY BOARD OF ELECTIONS; and
SUE PERRY, Shelby County Clerk and Chairperson, Shelby County Board of Elections - Respondents

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

Whether KRS 117.075(1) and KRS 117.085 impair the right to vote in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution by imposing conditions for entitlement to the special absentee ballot for disabled persons not similarly required for entitlement to the absentee ballots available to persons out of state on the date of the election?

Whether KRS 117.075(1) violates the Twenty-Fourth Amendment to the United States Constitution by requiring a physician's verification statement of disability which could involve a cost to the voter?

Whether the District Court erred in dismissing, on the pleadings, petitioner's claim that KRS 117.075(1) was unconstitutional?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No.

PRIME MOVERS, INC.;
KATHERINE F. IRVIN; and
DONALD R. SULLIVAN - - - - *Petitioners*

v.

KENTUCKY BOARD OF ELECTIONS;
THE HONORABLE FRANCES JONES MILLS, Secretary of State and Chairperson of the Kentucky Board of Elections;
BRADY A. MIRACLE, Executive Director, Kentucky Board of Elections;
JEFFERSON COUNTY BOARD OF ELECTIONS;
BREMER EHRLER, Jefferson County Clerk and Chairperson, Jefferson County Board of Elections;
SHELBY COUNTY BOARD OF ELECTIONS; and
SUE PERRY, Shelby County Clerk and Chairperson, Shelby County Board of Elections - - - - - *Respondents*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

May it please the Court:

The Respondent accepts the Petitioner's Statement of the (1) Opinion Below, (2) Jurisdiction and (3) Constitutional Provisions and Statutes involved. The Respondent takes exception to the Petitioner's State-

ment of (1) Questions Presented and, (2) Statement of the Case.

COUNTERSTATEMENT OF THE CASE

On October 23, 1980, this action was filed against the Kentucky State Board of Elections and its Executive Director, the Kentucky Secretary of State, the Jefferson County (Kentucky) Board of Elections and the Jefferson County Clerk, and the Shelby County (Kentucky) Board of Elections and the Shelby County Clerk, hereinafter referred to as Respondents. The causes of action presented in said complaint were as follows:

1. KRS 117.075(1) denies the Petitioners of equal protection of the law guaranteed under the Fourteenth Amendment to the United States Constitution by placing additional burdens on their right to vote on the basis of their disability.

2. KRS 117.075(1) denies Petitioners of rights guaranteed under the Fifteenth Amendment to the United States Constitution by abridging their right to vote on the basis of "race, color, or previous servitude."

3. KRS 117.075(1) deprives Petitioners of rights guaranteed under the Twenty-Fourth Amendment to the United States Constitution in that it involves a "poll tax."

4. KRS 117.075(1) deprives Petitioners of rights secured under §6, §145, and §147 of the Kentucky Constitution by denying them "the right to a free and equal election and their right to vote."

5. Respondents failed to ensure that polling places were accessible as required by KRS 198B.270 and 815 KAR 40:010.

No specific polling places were specified in the complaint.

The Fourth and Fifth causes of action involve state law claims and jurisdiction was sought under the Doctrine of Pendent Jurisdiction.

On the same date as the complaint was filed, the appellant sought and received a temporary restraining order restraining respondents from "refusing to issue a ballot to a voter otherwise qualified for failing to meet the provisions of KRS 117.075(1) which require a doctor's verification of disability and delivery of the application for a special absentee ballot by mail." The Court entered said order "because of the press of time since the presidential election was less than two weeks off." (See Petitioners' Appendix, p. 37).

A pre-trial conference was scheduled for Friday, December 19, 1980. No answer or other pleadings were filed by the respondents prior to said hearing in accordance with the requirements of Local Rule 14 pertaining to complex litigation. On December 9, 1980, petitioners filed an amended complaint, adding the following causes of action to those presented in its initial complaint:

1. Petitioners were deprived of equal protection by the selection of polling places inaccessible to the disabled.

2. Petitioners were deprived of their Fifteenth Amendment rights by the selection of inaccessible polling places.

3. The selection of inaccessible polling places by respondents entails a poll tax prohibited by the Twenty-Fourth Amendment.

4. Respondents have violated 42 U.S.C. §1971(a)(1) and 42 U.S.C. §1971(a)(2)(A) by enforcing KRS 117.075(1) which requires plaintiffs to obtain a doctor verification to obtain a disabled absentee ballot.

5. Respondents violated 42 U.S.C. §1971(a)(1) by selecting inaccessible polling places.

The pre-trial hearing was held on December 19, 1980 and it was informally established that no issues of fact existed and that the legal issues should be submitted by briefs. The Court created a schedule for the submission of briefs on the two tenable issues: (1) The distinction between the disabled ballot and the absentee ballot (pertaining to the equal protection attack on KRS 117.075(1)), and (2) The federal question of accessibility (pertaining to the constitutional issues raised in the amended complaint as to alleged inaccessible polling places. (Appendix A).

The Court clarified in its order that this case would stand submitted upon receipt of the briefs. (App. A, p. 1).

Subsequent to its receipt of briefs from all parties, the Court found in favor of the respondents on all issues and dismissed petitioners' complaint. Specifically the Court held that petitioners are not being

denied the franchise and that voting by absentee ballot is a privilege not a right. The Court further concluded that the General Assembly may properly impose reasonable conditions upon the issuance of a special ballot and that the medical verification is a reasonable requirement in light of the medical question presented by a disability. The District Court further concluded that the procedures specified in KRS 117.075(1) serve the legitimate function of preserving the integrity of the electoral process.

The Court summarily dismissed the Fifteenth Amendment claim since that provision applies only to denial based on race, color or previous servitude. The poll tax argument was also easily dismissed since the possible "payment of a fee to a physician does not entail a tax."

Additionally, the Court concluded that pendent jurisdiction was not appropriate with respect to the accessibility issue presented in this action since the federal and state issues did not derive from a common nucleus of operative fact. (Petitioners' Appendix A).

The first issue presented for consideration by the Sixth Circuit Court of Appeals, pertained to the constitutionality of KRS 117.075 which provides a *one-time* requirement for a physician's verification prior to receiving the absentee ballot for disabled voters. [Emphasis added]. The respondents position was and continues to be that KRS 117.075 is rational legislation, based on a legitimate state interest, that offends none of the requirements of the United States Constitution.

Petitioners' second group of issues pertained to the constitutionality of alleged inaccessible polling places. Petitioners argued that each and every county board of elections is constitutionally required to comply with the American National Institute's specifications for voting facilities and said boards have failed to comply with said specifications. The respondents maintained that the petitioners failed to assert substantial federal questions concerning the accessibility of polling places and that the district court properly dismissed said claims.

Additionally, petitioners argued before the Court of Appeals that the United States District Court erred in not exercising pendent jurisdiction over the state law claims. Respondents' position was that the dismissal of said pendent claims was a proper exercise of the court's discretion.

The Sixth Circuit Court of Appeals concurred with the position of the respondents herein for the reason set forth in the Order and Memorandum of Judge Thomas A. Ballantine, Jr. in the District Court and because there was no merit to the petitioners' claim that the facts set forth to invoke the pendent jurisdiction of the District Court also stated a federal claim. (See Petitioners' Appendix A).

After the Sixth Circuit Court of Appeals denied Petitioners' Petition for rehearing *in banc*, this petition for a writ of certiorari was timely filed and served on the respondents.

REASONS FOR DENYING THE WRIT

I. THE INSTANT CASE DOES NOT PRESENT AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

A. Under Applicable Decisions of This Court, the Absentee Ballot Voter Statutes of Kentucky Have No Effect Upon the Fundamental Right to Vote and Entail Rational Legislation in Accordance With Fourteenth Amendment Requirements.

The petitioners are not herein alleging that the respondents have deprived, or infringed upon, any person's right to vote at the polls, but allege rather that respondents have imposed a constitutionally impermissible condition upon the alleged right of petitioners to receive an absentee ballot. This Court has already held that the fundamental right to vote is not at issue in actions challenging a state's practice with regard to absentee ballots. *McDonald* v. *Board of Election Comm'rs. of Chicago,* 294 U. S. 802 at 807, 89 S. Ct. 1404, 22 L. Ed. 2d 739 (1969). In an analysis under the applicable "rational basis test," this Court has clearly stated that different treatment of the handicapped in the absentee ballot practices of a state is reasonable. *McDonald* v. *Board of Election Comm'rs. of Chicago, supra* at 809. Thus, this Court is not herein confronted with a federal question of substance that has not been previously settled by this Court.

1. THE CONSTITUTIONALITY OF KRS 117.075 MUST BE TESTED BY THE TRADITIONAL RATIONAL BASIS STANDARD FOR EVALUATING EQUAL PROTECTION CLAIMS.

The "compelling state interest test" has been applied in voting rights cases to determine whether a state's constitutional power to regulate justifies limiting First Amendment freedoms. The "compelling interest test" is inapplicable to the instant action for the statute here at issue has no effect upon any person's right to vote.

This action involves a Kentucky Statute which provides for disabled persons a privilege, not afforded to other citizens, of voting by absentee ballot. There is but one real requirement for obtaining this ballot, a physician's verification of disability, and that requirement need only be satisfied one time for this life long privilege. The petitioners herein have initiated this ltigation for the sole purpose of eliminating the inconvenience of obtaining said verification.

It is indisputable that disabled voters, under current Kentucky law, have the right to vote either at the polling place with the special assistance provided for the ill, aged or infirm under KRS 117.255 and the Kentucky Constitution §147, or by absentee ballot upon compliance with the requirements of KRS 117.075.[1]

---

[1]Constitution, §147 provides, in pertinent part, that the general assembly shall pass all necessary laws to enforce this section, and shall provide that persons illiterate, blind, or in any way disabled may have their ballots marked or vote as herein required.

KRS 117.255 provides, in pertinent part,

(Footnote continued on next page)

Disabled persons in the Commonwealth of Kentucky not only receive the same opportunity to vote as every other citizen, but additionally are the beneficiaries of special legislation designed to make certain that these citizens, whose special personal circumstance may prevent them from freely and easily exercising their right to vote, are capable of exercising their First Amendment rights.

Petitioners argue that "for many physically disabled voters the only method by which they can vote is the absentee ballot process." (Brief for Petitioners, p. 10). It is on the basis of this argument that petitioners present their unfounded conclusion that KRS

(Footnote continued from preceding page)

(2) No voter shall be permitted to receive any assistance in voting at the polls unless he makes and signs an oath that, by reason of inability to read English, or by reason of blindness or other physical disability he is unable to vote without assistance. Upon making and filing with the judges such oath, the voter shall retire to the voting machine, with the judges, and one of the judges shall then, in the presence of the other and the voter, operate the machine as the voter directs. The disabled person applying to vote may, if he prefers, be assisted by a person of his own choice who is not an election officer. The clerk shall swear the person accompanying the disabled or blind voter to operate the voting machine in accordance with the directions of the disabled or blind voter, and the disabled or blind voter and the person sworn shall then enter the voting booth and the one so sworn shall operate the machine for the disabled or blind voter as he directs. No voter shall be assisted under this subsection unless the judges and the sheriff of election are satisfied of the truth of the facts stated in the oath. The voter shall state in his oath the specific physical disability that required him to receive assistance, and the judges of election shall enter in writing, on a record of assisted voters, the voter's name and the specific physical disability which required him to receive assistance.

117.085 affects the fundamental right to vote. This contention cannot be supported under any set of facts.

First and foremost is the fact that in those cases where a disabled person cannot go to the polls to vote, and is unable, for some reason, [that respondents are unable to imagine], to obtain the one-time physician's statement necessary for a special disability absentee ballot, it is that individual's personal circumstance, not state action under KRS 117.075(1), that has interfered with that individual's exercise of the franchise. Surely, petitioners are not suggesting that the First Amendment requires every state to make certain that every individual is physically capable of voting on election day, regardless of each individual's personal circumstance on that day. The fundamental right to vote is not infringed because personal circumstances may prevent some from voting at a polling booth that is available to all.

Second, respondents submit that the Commonwealth of Kentucky has acted above and beyond any constitutional obligations, by enacting legislation which provides an easily accessible absentee ballot to disabled persons which gives said persons the option of voting by mail. Respondents submit that this procedure assures that each disabled individual has the opportunity to vote, despite their personal disability. Thus, although the Constitution does not require special arrangements to facilitate voting by the disabled and physically handicapped, the Commonwealth of Kentucky has taken this extra step to insure that all voters

have an opportunity to vote. See *Whalen* v. *Hamen*, 373 F. Supp. 353 (D.C. Conn. 1974).

The respondents submit that the mere imposition of one requirement for the obtainment of an absentee ballot could not effect the fundamental right to vote since there is no constitutional requirement for the existence of any absentee voting procedures. Certainly, petitioners do not contend that the fundamental right to vote is infringed by the availability of absentee ballots, although that right would not be affected by the total absence of special legislation.

In *Whalen* v. *Hamen, supra,* the plaintiff alleged that she was unable to vote because she was confined to her home by a serious illness and could not appear at the polls. Absentee ballots were totally unavailable to the named plaintiff, in that state law required the ballot to be cast in person. It is noteworthy that the situation for Ms. Whalen was comparable to the situation that petitioners allege could arguably exist under KRS 117.075 for a few disabled persons in that she was totally prohibited from voting due to her physical circumstances; of course, in Kentucky, the absentee ballot would have eliminated this voting barrier. The District Court reasoned in *Whalen* as follows:

> "Is there anything in the Constitution that prohibits a state from requiring that voting be done by physical attendance? Surely this is not an arbitrary or unreasonable requirement such as would violate the due process or equal protection clauses. A physically incapacitated voter has no more basis to challenge a voting requirement or

personal appearance than a blind voter can complain that the ballot is not printed in braille. Nor is it the province of courts to weigh the relative ease or difficulty with which the state could accommodate its voting procedures to meet the needs of various handicapped voters. These are policy questions to be resolved by the legislature.

"Though the constitution does not require a special arrangement to facilitate voting by the physically handicapped, legislators of course have ample discretion to enact remedial measures for this purpose. See E. G. Conn. Gen. Stat. §9-297.

"The earlier cases, though distinguishable as to their holdings, all characterize absentee ballots as a remedial device, the type of reform measure that legislators may generally extend by degrees. *McDonald* v. *Board of Elections,* 394 U. S. at 908, 89 S. Ct. 1404; *Prigmore* v. *Renfro,* 356 F. Supp. at 342; *Fidell* v. *Board of Elections,* 343 F. Supp. at 916. One cannot read the Supreme Court's unexcited catalogs of the groups of Illinois voters denied absentee ballots 'for whom voting may be extremely difficult, if not practically impossible', without concluding that the court did not believe their inability to vote denied them any constitutional right. *McDonald* v. *Board of Elections,* 394 U. S. at 810, N. 8, 89 S. Ct. at 1409."

In light of the above, it is clear that KRS 117.075 (1) has no effect upon the fundamental right to vote and must be tested under the "rational basis" equal protection test.

This is far from the first time that this Court has been asked to determine the appropriate test for pur-

poses of evaluating an "absentee ballot" statute. See *McDonald* v. *Board of Election Comm'rs. of Chicago, supra; O'Brien* v. *Skinner,* 414 U. S. 524, 38 L. Ed. 2d 702, 94 S. Ct. 740 (1974); *Raza Unida Party, et al.* v. *Bullock,* 349 F. Supp. 1272 (S.D. Texas 1972), affirmed in part and vacated in part; *American Party of Texas* v. *White,* 415 U. S. 767, 39 L. Ed. 2d 744, 94 S. Ct. 1296 (1974); reh. den. 416 U. S. 1000, 40 L. Ed. 2d 777, 94 S. Ct. 2414; *Goosby, et al.* v. *Osser, et al.,* 409 U. S. 512 (1973). An examination of these cases leaves no doubt as to the appropriateness of the "rational basis test" in this action.

In *McDonald* v. *Board of Election Comm'rs. of Chicago, supra,* pre-trial jail inmates were challenging the constitutionality of a statute making absentee ballots available to certain persons, including those absent from the county of their residence for any reason and those physically incapacitated who are able to present a doctor's affidavit to such effect, but not to inmates who possessed their civil rights and were incarcerated within the county of their residence. The appellants argued that said statute treated judicially incapacitated persons distinctly from physically incapacitated individuals and further maintained that the disparate treatment afforded inmates incarcerated within their county of residence and jail inmates incarcerated outside the county of their residence was arbitrary and unconstitutional.

The Supreme Court disagreed and concluded that: 1) the different treatment for the physically handicapped was reasonable, and 2) the failure of the statute

to extend the privilege of the absentee vote to in-county jail inmates was not arbitrary. In reaching this conclusion the Court initially clarified that the fundamental right to vote was not at stake, but merely the claimed right to receive absentee ballots. In that a fundamental right was not at issue, the Court reasoned that the traditional standard for evaluating the equal protection claim was appropriate and that standard was defined as follows:

> "The distinctions drawn by a challenged statute must bear some rational relationship to a legitimate state end and will be set aside as violative of the equal protection clause only if based on reasons totally unrelated to the purpose of that goal. Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify this."

See *McGowen* v. *Maryland,* 366 U. S. 420, 6 L. Ed. 2d 393, 81 S. Ct. 1101 (1961); *Cotch* v. *Board of Riverport Pilot Commissioners,* 330 U. S. 552, 91 L. Ed. 2d 1093, 67 S. Ct. 910 (1947); *Lindsley* v. *National Carbonic Gas Company,* 220 U. S. 61, 55 L. Ed. 369, 31 S. Ct. 337 (1911).

In *O'Brien* v. *Skinner, supra,* the Supreme Court was again concerned with a state election statute which denied inmates awaiting trial in the county of their residence the right to vote by absentee ballot while other inmates who did not reside in the county of their

incarceration were allowed to vote by absentee ballot. The facts in this case differed from those of *McDonald* in that the New York statute at issue in *O'Brien* completely denied the ballot to the aggrieved inmates, while there was nothing in the record of the *McDonald* case to show that the appellants were in fact absolutely prohibited from voting by the state. *O'Brien* v. *Skinner, supra* at 529. Accordingly, the Supreme Court concluded that the New York statute was wholly arbitrary in its exclusion of resident inmates for absentee voting privileges and thereby denied appellants equal protection of the laws.

In *Goosby* v. *Osser, supra,* the Court again considered the problem of inmate voting and concluded that, unlike the voting restrictions in the *McDonald* case, the statute there in question was an absolute bar to voting because of a specific provision that "persons confined in a penal institution" were not permitted to vote by absentee ballot. *O'Brien* v. *Skinner, supra* at 529-530. Accordingly, the Supreme Court, without intimating any view upon the merits, concluded that *McDonald* did not render the petitioners' constitutional claims wholly insubstantial.

In *Raza* v. *Bullock, supra,* the Court was confronted with the Texas Election Code which failed to provide absentee balloting for minority and independent candidates while it allowed absentee ballots to be cast for candidates of majority parties. The District Court relied on *McDonald* and the presumption that legislators act constitutionally in upholding said statute under the traditional rational basis standard, despite the fact

that the State of Texas did not offer any reasons for the disparate treatment. The United States Supreme Court vacated the judgment for further consideration in light of the holdings in *Goosby* and *O'Brien* to the effect that:

> ". . . permitting absentee voting by some classes of voters and denying the privilege to other classes of otherwise qualified voters in similar circumstances, *without affording a comparable alternative means to vote,* is an arbitrary discrimination violative of the Equal Protection Clause." *American Party of Texas* v. *White,* 415 U. S. at 795. [Emphasis added].

The above-cited cases clearly set forth the distinction between those statutes that totally deprive an identifiable class of persons of the right to vote through state action and those statutes that merely restrict the right to absentee ballots. In *O'Brien* v. *Skinner, supra* and *Goosby* v. *Osser, supra,* this Court was concerned about statutes which totally denied the right to vote to persons who were incarcerated by the state. Unlike the petitioners in this case, the inmates were denied an alternative mode of voting and were imprisoned by state action rather than personal health. Similarly in *American Party of Texas* v. *White,* 415 U. S. at 795, the state acted to *totally eliminate* the ability of absentee voters from voting for minority candidates. [Emphasis added]. The instant case differs drastically from that case since several alternative means of voting are available to disabled voters in Kentucky and their

predicament resulted from their personal situation rather than state action. No matter how harsh the plaintiffs argue that the one-time requirement for a certificate of disability may be, the fact remains that this inconvenience does not absolutely prohibit any person from voting. See *O'Brien* v. *Skinner, supra,* at 529.

It should also be noted that petitioners lengthy discussion of the United States Supreme Court cases of *Kramer* v. *Union Free School District,* 395 U. S. 621, 89 S. Ct. 1886 (1969) and *Dunn* v. *Blumstein,* 405 U. S. 336, 92 S. Ct. 995 (1972) on pages 14 through 16 of its Petition is totally misplaced. Those cases pertain to statutes which limited the franchise to certain interested groups of people or citizens who meet certain duration resident requirements. The statute here at issue restricts no individuals from their right to vote at the polls.

2. KRS 117.075 DOES NOT OFFEND THE EQUAL PROTECTION CLAUSE IN THAT A "RATIONAL BASIS" EXISTS FOR THE DISTINCTION IN THE REQUIREMENTS FOR ABSENTEE VOTER BALLOTS AND SPECIAL BALLOTS FOR DISABLED VOTERS.

Having concluded that the rational basis standard is applicable to the instant action, the issue before this Court is whether the separate classification of disabled voters for the purpose of receiving absentee ballots and the one-time requirement for a physician's vertification of disability contained in subject statute rests on a rational and reasonable distinction between disabled

voters and other absentee voters.[2] Undoubtedly, a rational distinction exists between these two groups of absentee voters. As the Supreme Court stated in *McDonald* v. *Board of Election Comm'rs. of Chicago, supra,* at 908:

> *"It seems quite reasonable for the Illionis legislature to treat differently the physically handicapped, who must, after all, present affidavits from their physicians attesting to an absolute inability to appear personally at the polls in order to qualify for an absentee ballot."* [Emphasis Added].

The obvious rationale for the physician's statement required under this statute is to (1) provide expert, medical verification for a medical disability and (2) to prevent fraud and preserve the integrity of the electoral process by requiring credible proof of the absentee voter's disability. A determination that one is disabled is clearly a medical decision that can only be sworn to by a qualified medical examiner. An individual voter would, in most cases, be totally unqualified to verify whether he or she was in fact disabled and whether said disability was temporary or permanent. Thus without being fraudulent and punishable under KRS 117.995(4), they could still wrongfully obtain the ballot because of their honest misunderstanding of what entails a "medical disability" or a "permanent disability." On the contrary, an absentee voter under

[2]A copy of the required physician's verification form is attached, as Appendix B. The burden of having such a form filled out by one's physician is obviously minimal and should entail no, or minimal, cost.

KRS 117.085 is clearly qualified to attest to the fact of his or her absence from the county on the election day and could clearly be prosecuted and penalized under KRS 117.995(4) for false swearing on said application.

The verification also serves the function of preventing fraud on the electoral process by persons who are not disabled. In a very similar case, the United States Supreme Court affirmed a district court decision holding that an Alabama statute, which provided absentee voting for only certain classes of voters, was not arbitrary or in violation of the Equal Protection Clause since it was designed to prevent fraud. *Prigmore* v. *Renfro,* 356 F. Supp. 427 (N. D. Ala. 1972), affirmed 410 U. S. 919, 35 L. Ed. 2d 582, 93 S. Ct. 1369 (1973). The facts pertinent to the instant case demand the same conclusion of constitutionality.

The petitioners fail to comprehend the reasoning and rationale of the Kentucky legislature in requiring the physician's verification when they argue that the requirement of a physician's verification to corroborate the disabled voter's statement implies that disabled voters are considered more fraudulent than other absentee voters. On the contrary, this statute is directed at *non*-disabled persons, not qualified for this special ballot, who would take advantage of this easily accessible special ballot for fraudulent purposes. Any truly disabled person would be legally entitled to the benefits of this ballot and would have no motive for dishonesty.

3. DISABLED VOTERS HAVE NUMEROUS ALTERNATIVE MEANS OF VOTING.

Petitioners argument that KRS 170.075 provides no alternative means for disabled voters to vote, comparable to the situation presented in *American Party of Texas* v. *White, supra,* is totally frivolous. Disabled voters in the State of Kentucky are offered alternative methods of voting: (1) at the polls with special assistance provided in accordance with KRS 117.255; Ky. Const. §147 or, (2) by absentee ballot in accordance with KRS 117.075. While the statute at issue in the Texas case totally prohibited absentee voters from voting for minority candidates, the statute here at issue offers an additional and comparable alternative means of voting.

B. The Requirement of a Physician's Verification Statement in KRS 117.075 Does Not Entail a Poll Tax.

Under applicable decisions of this Court the petitioners argue that the respondents have violated the Twenty-Fourth Amendment to the Constitution of the United States by administering and enforcing KRS 117.075(1) in that the doctor's verification requirement results in an additional and undue condition and burden placed upon the disabled person to exercise his or her right to vote. In that such additional burden may result in a direct or indirect financial cost to the disabled person, petitioners argue that this direct or indirect cost has the effect of a poll tax and is prohibited by the Twenty-Fourth Amendment. The re-

spondents vigorously maintain that this argument is totally frivolous.

The Twenty-Fourth Amendment to the United States Constitution provides:

> "The right to cititzens of the United States to vote in any primary or other election . . . shall not be abridged by the United States or any state by reason of failure to pay any poll tax or other tax." U. S. Const., Twenty-Fourth Amendment.

The clear intent of this constitutional amendment is to preclude any state from circumscribing or burdening or impairing or impeding the right of a voter to the free and effective exercise and enjoyment of the franchise in the election of any federal official on the ground of wealth or ability to pay a poll tax. *Gray* v. *Johnson,* 234 F. Supp. 743 (D. C. Miss. 1964). Accordingly, if the one-time requirement for a physician's statement verifying the absentee voter's disability entails an imposition of a charge or penalty by the state on the exercise of the fundamental right to vote, this requirement would be prohibited under the Twenty-Fourth Amendment. See *United States* v. *State of Texas,* 252 F. Supp. 234 (1966), affirmed 384 U. S. 155, 16 L. Ed. 2d 434, 68 S. Ct. 1383.

Even in the improbable case where a physician charges for signing such an affidavit, this incidental cost would not involve a poll tax. First, we are not talking about a charge on the exercise of the right to vote but merely an incidental cost involved in utilizing the absentee ballot procedure. As the Supreme Court

stated in *McDonald* v. *Board of Election Comm'rs, of Chicago, supra,* at 807-808:

> "Despite appellant's claim to the contrary, the absentee statutes, which are designed to make the voting more available to some groups who cannot easily get to the polls, do not themselves deny appellants the exercise of their franchise."

Second, the incidental charge that may conceivably result from the physician's statement does not qualify as a "tax" for it is not charged by or for the "support of the government." Black's Law Dictionary. See also *Whalen* v. *Hamen,* 373 F. Supp. 353 (D. C. Conn. 1974). The cost is, in fact, no more than an incidental cost upon the disabled person resulting from that individual's personal circumstances, just as the cost of gas imposes an additional burden upon persons who are not within walking distance from the location that the government selects for the polling place. When the government selects a location for a polling place, it undoubtedly indirectly benefits individuals who reside close to the selected poll sites; petitioner's position would necessarily characterize the extra travel cost incurred by voters living further from the polling place selected by the government as a poll tax.

Undoubtedly, numerous persons may receive some monetary gain by the fact that the Commonwealth of Kentucky does not establish polling places in each and every persons home. Nevertheless, it cannot be credibly argued that the Twenty-Fourth Amendment demands that every citizen be reimbursed by the state

for costs involved in going to the polling booth or mailing an absentee ballot. Inevitably, certain individuals will bear a greater burden in exercising the numerous rights and privileges afforded under our government.

The conclusion of the United States District Court and the Sixth Circuit Court of Appeals that KRS 117.075(1) does not offend the Twenty-Fourth Amendment to the United States Constitution is clearly correct. The one case cited by petitioners does not remotely indicate the applicability of the Twenty-Fourth amendment to the indirect costs involved in utilizing an absentee ballot. *Harman* v. *Forsseeius,* 380 U. S. 528 (1965).

In *Harman* v. *Forsseeius, supra,* the Supreme Court was concerned with a Virginia Statute which required, in order to qualify to vote in federal elections, either the payment of a poll tax or, in the alternative, the filing of a certificate of residence. That case pertained to a poll tax that was imposed directly on the right to vote by the state. Unlike the direct tax involved in *Harman,* the instant case concerns absentee ballots, not voting requirements, and the possibility that some physician, not the state, may receive a fee as the indirect result of the verification requirement. The distinction is obvious.

II. DISMISSAL OF PETITIONERS' CONSTITUTIONAL CLAIMS UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6) WAS CLEARLY AUTHORIZED IN THIS CASE.

The primary constitutional issue before the federal courts in this case has been whether KRS 117.075(1), which sets forth special procedures for obtaining absentee ballots for the aged, disabled or handicapped, is unconstitutional. Petitioners maintain that it is unconstitutional because of its requirement that disabled persons obtain once during their lifetime a verification from a physician specifying that they are temporarily or permanently disabled, while out of state absentee ballot voters may obtain an absentee ballot based upon their own verification. Petitioners maintain in their second argument that the District Court further erred in dismissing their complaint on a motion to dismiss without allowing them to present evidence that could arguably show that KRS 117.075 has the effect of denying the right to vote to persons subject to that statute. Respondents submit that it is beyond doubt that the petitioners could have proved no set of facts to show that KRS 117.075 involved the right to vote and entailed an infringement of that right. See *Conley* v. *Gibson,* 355 U. S. 41, 78 S. Ct. 99 (1959).

Each of the cases cited by petitioners in support of their argument involves statutory schemes which exclude a certain group of citizens from the benefit of the use of the absentee ballots. In each of said cases wherein this Court has held that the statutory schemes involved an infringement on the right to vote, or that

proof should be allowed to determine whether the right to vote was effected, the fact or possibility existed that state action had left certain persons, excluded from the absentee ballot procedures, no alternative mode of voting. See *O'Brien* v. *Skinner, supra* (resident, pre-trial inmates, prohibited from going to polls by state action, were totally denied right to vote by statute which excluded them from benefit of absentee ballot); *Goosby* v. *Osser, supra* (facts could be proven to show that statute, prohibiting persons confined to penal institution from voting by absentee ballot, could entail absolute bar to exercise of franchise); *American Party of Texas* v. *White, supra* (statutory exclusion of minority candidates from absentee ballots with no comparable alternative means to vote may affect right to vote).

Unlike the situation at issue presented in the cases cited above, the petitioners are not excluded by the challenged statute (KRS 117.075) from any voting benefits. Disabled persons are not prohibited by the State of Kentucky from voting at the polls or treated differently from other citizens with regards to voting by absentee ballot upon personal verification that they are out of state. Disabled persons in the Commonwealth of Kentucky are entitled to the additional benefits of KRS 117.075 if they are truly disabled or handicapped. Unlike the statutes at issue in the cases cited above, this statute does not restrict a group of citizens from voting procedures available to other citizens, but rather affords a special group of people an additional means and incentive to vote. No new facts could

alter the fact that KRS 117.075 takes no voting alternatives away from the petitioners.

To accept petitioners argument would establish a constitutional requirement that each state adopt special absentee voting procedures for the disabled. Undoubtedly, each state will have some citizens who cannot vote at the polls, even with special assistance. Thus, absentee voting may be their only means to vote. Does this fact impose upon the state a constitutional obligation to make sure that each individual not only has an equal opportunity to vote, but also equal accessibility to the ballot, despite their personal circumstances. Although this may well be a desirable legislative goal, it is certainly not a mandate of the United States Constitution.

CONCLUSION

For the aforegoing reasons, respondents submit that KRS 117.075 has no adverse effect upon the fundamental right to vote, but rather entails legitimate remedial legislation affording disabled persons an additional, easily accessible means of voting. Respondents further show that the issue presented before this Court is not novel in that this Court has already stated that First Amendment rights are not involved in similar cases. No amount of discovery or fact finding could alter the clear and inevitable fact that voting rights are not restricted under KRS 117.075. For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Frankfort, Kentucky 40601
Counsel for Respondents

PROOF OF SERVICE

I, Stephen L. Frank, the counsel for the respondents, hereby certify that three (3) copies of the foregoing Brief in Opposition to the Petition for Writ of Certiorari were mailed, first class postage prepaid, to Geneva F. Perry, Counsel of Record, and Brian P. Lawlor, Legal Aid Society, Inc., 425 West Muhammad Ali Blvd., Louisville, Kentucky 40202; Sara L. Pratt, Kentucky Civil Liberties Union, 3618 Lexington Road, Louisville, Kentucky 40207, J. Matthew Carey, Jefferson County Attorney, 2720 Citizens Plaza 40202, and Hite Hays, County Attorney, Courthouse, 501 Main Street, Shelbyville, Kentucky 40065, on this the 18 day of December, 1981.

Assistant Attorney General

APPENDIX

EXHIBIT A

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. C-80-0527-L(B)

PRIME MOVERS, INC., et al.

v.

KENTUCKY BOARD OF ELECTIONS, et al.

ORDER

The above-styled case came on for pre-trial conference in the Court's chambers at Louisville, Kentucky, on Friday, December 19, 1980, and there appeared Ms. Geneva Perry and Ms. Sara Pratt on behalf of the plaintiffs; and Mr. Steve Frank, Mr. James Hite Hays and Mr. Mike Herrod on behalf of the defendants.

Discussions having been held and the Court being otherwise sufficiently advised,

IT IS HEREBY ORDERED that the defendants be granted until January 5, 1981, in which to file their memorandum solely on the question of their distinction between the Disabled Ballot and the Absentee Ballot. Plaintiff shall have until January 20, 1981, in which to respond, at which time the matter will stand submitted.

IT IS FURTHER ORDERED that the plaintiffs be granted until January 5, 1981, in which to file their memorandum solely on the Federal question of accessibility. Defendants

shall have until January 20, 1981, in which to respond, at which time this matter will also stand submitted.

Accordingly, It Is Further Ordered that this case be passed pending further order of Court.

Dated: December 19, 1980.

(s) Thomas A. Ballantine, Jr.
United States District Judge

Copies to all Counsel of Record.

EXHIBIT B

_____

Name of Voter

_____

Voter's Social Security Number

I, _____, certify that I am acquainted with
(Physician)
_____ and he/she is disabled to the extent
(Voter)
that he/she will be unable to go to the voting precinct to vote on election day, and his/her disability is: ☐ temporary ☐ expected to be continuing.

This _____ day of _____, 19____.

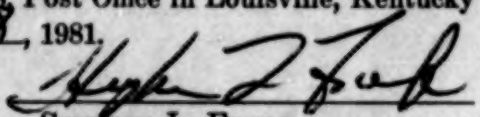
_____

(Signature of Physician)

If your physician has indicated that your condition is continuing you will not need to file further statements of disability. The County Clerk will keep your statement on file for future elections. You will, however, be required to make application for a special ballot prior to each election.

SBE-47-7-78

I, Stephen L. Frank, swear that I am a member of the Bar of the United States Supreme Court and that I have this day mailed to the Clerk of the U. S. Supreme Court Respondents' Response to Petition for A Writ of Certiorari in *Prime Movers, Inc., et al.* v. *Kentucky Board of Elections, et al.*, by U. S. mail, first class, postage prepaid. It was deposited with the U. S. Post Office in Louisville, Kentucky 40601 on December 18, 1981.



STEPHEN L. FRANK
Assistant Attorney General
State Capitol
Frankfort, Kentucky 40601

Subscribed and sworn to before me by Stephen L. Frank, this ____ day of December, 1981.

My commission expires: _____

_____
Notary Public
Ky. State at Large